If Conditions 2(c) and 3 are read together, it means that service can be terminated at any time *on payment* of one month's salary in lieu of notice. In such a case, the date of termination is irrelevant. There was nothing in the agreement for instance to stop the plaintiff leaving one month's salary with the State Engineer on any day and walking out of his job. The State Engineer could not have compelled the plaintiff to work for the rest of that month.

Counsel for the defendant was quite prepared to concede that if at all, the plaintiff was entitled to balance of salary for the month of November, namely the period that he had not worked. I do not agree. The month-to-month basis if it means anything at all when the letter of appointment is read as whole in conjunction with General Orders Cap. D can only mean that the appointment of the plaintiff is of such a temporary nature that it is subject to review every month. It does not mean that he is entitled to one month's work because at the time of his termination the plaintiff was entitled to three months' notice. If I accept the argument of both counsel it would mean that plaintiff is entitled to three months' salary. If that be the case then it negates the alternative method of termination by paying one month's salary in lieu of notice. At most the month-to-month provision means that where it is decided to terminate service by way of notice the period runs from the first day of the calendar month next following the service of the notice. Thus if the letter of November 19, 1966 had been a notice to terminate service instead of notification of termination, the three months' period would commence from December 1, 1966 and end on February 28, 1967. I therefore hold that the termination of service on November 19, 1966 was not wrongful dismissal and I further hold that the plaintiff was not entitled to salary for the remaining part of November 1966.

I would accordingly dismiss this action with costs.

*Claim dismissed.*

Solicitors: *Morris Edgar & Co.*

## DIRECTOR-GENERAL OF INLAND REVENUE v. CENTRAL SUGARS BHD.

**[A.C.J. (Chang Min Tat F.J.)**
**January 20, July 19 & September 1, 1977]**
**[Kuala Lumpur — Tax Appeal No. 2 of 1976]**

*Revenue Law — Pioneer industry — Sugar production — 5-year period of tax exemption — Hedging — Whether taxable — Whether hedging is part of business of sugar refinery.*

The tax payer enjoyed the status of pioneer industry during which time, January 1, 1968 to December 31, 1972 (5-year period) its profits were exempt from income tax. Revenue however sought to levy income tax on profits derived from hedging, an operation consisting of forward sales and purchases of raw sugar. The Special Commissioners were of the opinion that the taxpayer was neither speculating in the terminal sugar market nor was it engaged in activities amounting to a separate business. Hedging was necessary for the purpose of stabilising and lowering the costs of the raw sugar used by it in its production of refined sugar.

The question before the court was whether the Special Commissioners were right in law in coming to this decision on the facts as found by them.

**Held:** (1) the court will interfere only "if the case contains anything *ex facie* which is bad law and which bears upon the determination";

(2) the Special Commissioners were justified by the facts and evidence in arriving at the conclusion that the terminal transactions entered into by the taxpayer were not merely speculation but hedging operations which formed part of its business as sugar refiners.

*Cases referred to:-*

(1) *Edwards* v. *Bairstow & Harrison* [1956] A.C. 14 @ 36.

(2) *U.H.G.* v. *Director-General of Inland Revenue* [1974] 2 M.L.J. 33.

(3) *Atlantic Sugar Refineries Ltd.* v. *Minister of National Revenue* 49 D.T.C. 602 @ 604.

(4) *Reids Brewery Co. Ltd.* v. *Male* 3 T.C. 279 @ 284.

TAX APPEAL.

*Datuk Eusoffe Chin* (Senior Federal Counsel) and *Bakaruddin bin Sulaiman* (Federal Counsel) for the appellant.

*J. Puthucheary* for the respondent.

**Chang Min Tat F.J.:** By reason of the abandonment by Revenue of the challenge to the Special Commissioners' finding with respect to the value of the plant and machinery, the remaining issue before this court in the case stated is the determination by the Special Commissioners that

"The profits from terminal sugar transactions during the Taxpayer's tax relief period form part of the profits from its business of producing refined sugar."

The Taxpayer took over the business of the United Malay States Sugar Industries Limited as a going concern on October 15, 1965. On September 2, 1969, it was given a pioneer certificate in respect of its production of refined sugar, back-dated to January 1, 1968. The status expired on December 31, 1972. During this 5-year period, its profits were exempt from income tax. Revenue however sought to levy income tax on profits derived from an operation known in the business world as hedging which, briefly, consists of forward sales and purchases of raw sugar.

*Facts of the Case*

As far as they are pertinent to the subject-matter of the appeal, the facts are as stated in the following numbered paragraphs of the case:

"(ix) As producers of refined sugar, the respondent had to purchase raw sugar, and it had during the years 1965 to 1967 purchased its requirements of raw sugar mainly through Mitsubishi Shoji Kaisha Ltd. of Japan (hereinafter referred to as 'M.S.K.'). Some orders during that period were placed through Kuok (Singapore) Pte. Ltd. (hereinafter referred to as 'Kuok').

(x) The contracts for the purchase of raw sugar were made several months ahead of their delivery dates. Those contracts provided for the quantities and quality of raw sugar to be supplied and the months in which they were to be shipped and delivered. The prices were either 'By call at buyer's option' for certain fixed period (Exhibit A9) or were based on the average of the daily London price during the week of shipment, or the average of the daily London price over a period of months (Exhibit A6, A7 and A8).

(xi) The selling price of refined sugar in this country had, since before the commencement of the respondent's operations, been fixed by Government and no adjustments could be made to the selling price without Government approval granted by the Ministry of Trade and Industry. But, apart from uncertainties in the quality and quantity of raw sugar available for supply, its price is also subject to violent and rapid fluctuations. *In order to protect its costs of raw sugar and avoid undue exposure to such fluctuations, the respondent, like any other producer of refined sugar, had to enter the terminal market to trade in sugar futures in relation to its raw sugar purchases which is otherwise known as hedging operations.* The respondent's hedging operations did not synchronise with its purchases of raw sugar. The amounts hedged during the relevant years varied from 22.7% to 67.05% of its raw sugar purchases (Exhibit A32(A)).

(xii) The hedging operations in this case, which were also known as terminal sugar transactions, were conducted by the respondent's agents, viz. M.S.K and later, Kuok, who entered into hedging contracts in London or New York, as the case may be, on behalf of the respondent. The hedging contracts, like the contracts for purchases of raw sugar, also provide for the delivery of raw sugar, but it is only exceptionally that hedging contracts are entered into with the intention of taking up raw sugar at the terminals, and they are almost invariably offset by other hedging contracts for sale of similar quantities of raw sugar futures at the terminals.

(xiii) During the early years, one of the respondent's directors, one Martin Lee, was solely responsible for the purchase of its raw sugar requirements. That director was also responsible for the respondent's hedging operations when the transactions were made through M.S.K. Because of difficulties in obtaining details of contracts made with M.S.K. the respondent decided during 1968 to terminate all dealings with M.S.K. and thereafter continued its purchases of raw sugar through Kuok. Kuok was also requested to handle all the respondent's transactions on the terminal market to give price cover on its purchases of raw sugar.

(xiv) Kuok acted for the respondent as well as for Malayan Sugar Manufacturers Sdn. Bhd., another sugar refinery operating in Malaysia, (Exhibit A18) and most purchases of raw sugar were made for the joint account of the two companies generally in the proportion of one-third for the respondent and two-thirds for Malayan Sugar Manufacturers Sdn. Bhd.

(xv) The respondent's accounts for the periods October 16, 1965 to December 31, 1965 and January 1, 1966 to May 31, 1966 did not include any profits or losses from their terminal transactions. A loss of $45,654.34 was for the first time brought into their accounts on May 31, 1967 (Exhibit R34). A further sum of $1,115,859.65 representing overpayment of raw sugar, including the net result of the terminal transactions conducted through M.S.K. from 1965 to 1968, was credited to its raw sugar account on May 31, 1968.

(xvi) The profits or losses on transactions in the terminal markets in London and New York were not entered into the books of the respondent at the end of each relevant year. The directors brought into the respondent's account at irregular intervals whatever amounts they thought fit. The following schedule shows the actual profits or losses made in the terminal markets and the amounts brought into the respondent's accounts during the relevant years (as per Exhibits A44A & B which amended the figures in Exhibit A29):

| *Period* | *Actual Profit or Loss* | *Amount Brought into the Accounts* |
|---|---|---|
| Year ended 31.5.67 | ($ 45,654.00) | ($ 45,654.00) |
| Year ended 31.5.68 | ($ 594,047.00) | ($ 667,553.00) |
| Year ended 31.5.69 | $ 536,993.00 | $ 384,116.00 |
| Year ended 31.5.71 | $2,434,120.00 | $2,365,187.00 |
| Year ended 31.5.72 | $3,086,502.00 | $ 407,700.00 |

(The figures in brackets are losses)

(xvii) Certain donations amounting to $150,000 during the year ended May 31, 1967 and $771,000 during the year ended May 31, 1968 were debited to the raw sugar purchase account even though there was a separate donations account in the books of the company for the year ended May 31 1968. The respondent had agreed to the disallowance for these sums by the Appellant."

*Contention of the Taxpayer*

Before the Special Commissioners, the Taxpayer contended that for manufacturers, hedging which was directed to either obtaining a stable price or reducing the costs of the raw materials of manufacture by such forward purchases and sales, being related to the business carried on by it, must lead to the "inevitable conclusion" that it was an essential and an integral part of its business of sugar refiners, and the profits therefore were covered by the pioneer certificate.

*Contention of Revenue*

Insofar as the facts as found by the Special Commissioners are concerned, Revenue was prepared to accept them except as to that the italicized passage in paragraph (xi) quoted above.

Revenue contended that there was no evidence of any hedging. It did not argue against the reasons for hedging, but the point it took was that the onus was on the Taxpayer to establish that its operations on the terminal market constituted hedging and not speculation. It submitted that the Taxpayer had not proved it was hedging. It then contended that if speculation, it was not covered by the pioneer certificate, it being a separate trade and the profits were chargeable. Alternatively, it argued that if hedging, it still did not come under the exemption of the pioneer certificate.

Revenue thought that certain aspects of the Taxpayer's operations on the terminal market pointed to the truth. Revenue's argument is condensed thus in the Case:

"(c) That there was no evidence of hedging and the onus is on the respondent to prove that the terminal transactions amounted to hedging. Whilst Revenue does not dispute the reasons given for hedging and the evidence given as to how hedging was operated as in the case of Atlantic Sugar Refineries Ltd., yet respondent has failed to prove satisfactorily that the operation and method adopted by it on terminal transactions actually amounted to hedging. The respondent's terminal transactions were left entirely in the hands of its agent and only the net results without reference to the period when the said transactions were made, were entered in the accounts.

(d) That the terminal transactions were not related to the contracts for physical raw sugar or *vice versa*. The entire operation of terminal transactions was carried on independently of the purchase of raw sugar.

(e) That the terminal transactions did not even cover half the raw sugar purchases. In other words, there was no 100% cover and the intention of the respondent was to make a profit and not to safeguard possible losses in its purchase of physical raw sugar."

Insofar as these aspects were concerned, the Special Commissioners agreed that the profits and losses on the terminal transactions were not entered in the books of the Taxpayer at the end of each year and that deductions had been made from the profits as donations. The Taxpayer conceded that these contributions were not deductible. In their view, Revenue's criticisms of the Taxpayer's accounts were justified in that they did not give a true and fair view of the results of the business for the relevant financial years but they considered that "it would be up to the proper authorities concerned to consider whether any appropriate action ought to be taken. Our concern on this particular issue was merely to determine whether the evidence as a whole showed that the activities of the Taxpayer amounted to hedging as part of its business as sugar refiners."

The documentary evidence adduced before them was mainly the accounts relating to these terminal transactions. By way of oral evidence, the Taxpayer called Tan Sri Tan Hian Tsin, its managing director and Mr. Loy Yet King, its general manager. It was said that their oral evidence only explained the operation of and the necessity for hedging and did not explain or assert, in so many words, that the Taxpayer's dealings were hedging. Revenue did not call any evidence.

On this evidence, the Special Commissioners were of the opinion that the Taxpayer was neither speculating in the terminal sugar market nor was it engaged in activities amounting to a separate business. It had entered the terminal market for the purpose of stabilising and lowering the costs of the raw sugar used by it in its production of refined sugar.

The question for me to consider is whether the Special Commissioners were right in law in coming to this decision on the facts as found by them.

*Function of the Court*

The principles have been enunciated in various passages in a number of decisions, not the least noteworthy being that oft-cited passage from Lord Radcliffe's speech in *Edwards v. Bairstow & Harrison.*[1] It is only necessary to extract the following: The court will interfere only "if the case contains anything *ex facie* which is bad law and which bears upon the determination" or if "the facts found are such that no person judicially and properly instructed as to the relevant law could have come to the determination under appeal." In these circumstances, there has been an error in point of law and the court must intervene. See also U.H.G. v. *Director-General of Inland Revenue,*[2] which Revenue cited. The same thing is said.

*Have the Special Commissioners found their facts without evidence or on a view of the facts which could not reasonably be entertained or that the primary facts do not justify the inferences drawn or the conclusion arrived at?*

This stated in so many words constituted the burden of the complaint of Revenue against the decision of the Special Commissioners. But in substance, this is a contradiction, at least, in part, of its own concession just as clearly stated that it agreed with the findings of the Special Commissioners save in one respect, and that is in the underlined sentences in paragraph (xi) of facts found.

Insofar as Revenue's contention that the facts as found by the Special Commissioners were not based on the evidence adduced before them is concerned, there is undeniably the evidence in the books of considerable forward purchases and sales of raw sugar in the terminal market. Nevertheless, Revenue contended that unless someone came forward to say that they were specifically hedging operations, then they need not or could not be so. It relied for its contention on the evidence given by the two witnesses called by the Taxpayer and it averred that neither of these witnesses made this specific averment. The note of the Special Commissioners is that these witnesses told them that "the reason why their company had to hedge was to bring down the cost of the raw sugar which they used for providing refined sugar, the selling price of which was controlled by Government. They said that hedging operations had to be carried out by them in addition to their raw sugar purchases because they provided some sort of protection, in the absence of insurance, against the price fluctuations of raw sugar. In other words, hedging helped to stabilize and bring down the costs of the raw sugar in this case." With respect, it therefore seems to me that the contention of Revenue that there was no evidence of hedging could not be true and that on the other hand, there was evidence not only of an explanation of the mechanics and the necessity of hedging but also of the actual operation of hedging in the case in question.

The Special Commissioners noted the criticisms levied by Revenue against the Taxpayer (1) that the Taxpayer's operations had no connection with its raw sugar requirements, (2) that the period of hedging did not coincide with the period of delivery of physical raw sugar and (3) the peculiar way in which the accounts relating to these terminal transactions were kept. As for the last, the Special Commissioners' attention was drawn to these accounts. They agreed with the criticism and accepted the Taxpayer's concession to make adjustment.

The Special Commissioners also agreed with Locke J. in *Atlantic Sugar Refineries Ltd.* v. *Minister of National Revenue,*[3] that

"According to the witness, in the ordinary case of a hedge, the selling for future delivery synchronizes with the purchase of the commodity while, in the present case, the short sales were made over the period of a month following the cash purchases. I think that this circumstance does not affect the matter to be determined. While not carried out contemporaneously with the purchases, the short sales were in effect a hedge by the company against a possible loss on the purchases made and it was only the imposition of control on October 2nd that rendered further hedging operations inadvisable. In trades where natural products are purchased in large quantities, hedging is a common, and in some cases a necessary practice, and the cost of such operations in trades

of this nature is properly allowable as an operating expense of the business. Where, as in the present case, the trader elects to close out his short sales and take a profit, this is, in my opinion, properly classified as profit from carrying on the trade. Mr. Hayden contended that this was simply a speculation in raw sugar resulting in a capital profit such as might have resulted from a speculation in shares or some other commodity but, upon the evidence in this case, that position cannot, in my opinion, be supported."

And as noted by Kerwin J. in the same case at page 603.

"In no sense may it be said that the operations were unconnected with the appellant's business and it is at least an added circumstance that speculation was made in raw sugar. Even if it were the only transaction of that character it should be held in the light of the evidence that it was part of the appellant's business or calling."

The Special Commissioners therefore rejected Revenue's argument that to amount to genuine hedging the terminal transactions should equal the physical requirements or that the period of hedging should coincide with the period of delivery of the raw sugar.

The Special Commissioners felt that "it is common sense and hardly illogical in our view, that in order to manufacture refined sugar the (Taxpayer) had to purchase raw sugar. The price of raw sugar is subject to violent fluctuations in the world market and there was no way for the (Taxpayer) or any other refined sugar manufacturer to insure itself and protect its costs of raw sugar except to hedge on the terminal market."

With respect, I agree that on the facts as found by them, for which there was sufficient evidence, the Special Commissioners were for the reasons given by them amply justified in arriving at the conclusion that the terminal transactions entered into by the Taxpayer in this instance were not merely speculation but hedging operations.

*Alternative argument: a separate business?*

There is an alternative argument by Revenue that the hedging operations were not covered by the pioneer certificate. By this certificate, the Taxpayer was deemed to be a pioneer company/factory for the production of refined sugar. To produce this product, it needed the raw sugar. The primary source would be the purchase of the raw sugar and the one recognised method of stabilising the price of the required sugar is to hedge on the terminal markets. Hedging is therefore, to borrow the words used by Pollock B. in another context, in *Reids Brewery Co. Ltd.* v. *Male*[4] "an adjunct, ancillary to and a very advantageous adjunct to" the business of sugar refinery. Hedging does not in the context of this case become a separate business.

The appeal is therefore dismissed with costs.

*Appeal dismissed.*

Solicitors: *Skrine & Co.*

## NG GOH WENG & ORS. v. PUBLIC PROSECUTOR

**[R.Cr.J. (Gunn Chit Tuan J.) December 16 and 28, 1977]**
**[Penang — Criminal Revision No. 11 of 1977]**

*Criminal Law and Procedure — Criminal revision — Production of statement made by accused at preliminary inquiry — Admissibility of — "Inquiry" distinguished from "trial" — Scope of s. 113(1), C.P.C. — Criminal Procedure Code, ss. 2, 113(1), 139 & 422 — Evidence Act, 1950, ss. 5, 26 & 136 — Courts of Judicature Act, 1964, s. 35(1).*

The three accused were charged provisionally for having committed an offence punishable under section 302 read with section 34 of the Penal Code. A preliminary inquiry was held in the course of which the prosecution produced a statement alleged to have been made by third accused. The Inquiry Magistrate allowed the statement to be received in evidence notwithstanding objection by counsel for the third accused. Counsel for the three accused applied under section 35(1), Courts of Judicature Act, 1964 for the court's revision in this matter.

The court was faced with the question of whether the cautioned statement is admissible at a preliminary inquiry.

**Held:** (1) as the provisions of the amended section 113(1), Criminal Procedure Code do not apply to preliminary inquiries, a Magistrate at a preliminary inquiry is still bound by the provisions of the Evidence Act.

(2) section 26 of the Evidence Act is applicable in this case. In the absence of any express provision, a statement which amounts to a confession made by any person whilst he is in the custody of a police officer is not admissible unless it was made in the immediate presence of a President of a Sessions Court or Magistrate;

(3) the statement should not have been taken as evidence and the learned Magistrate should expunge it from the record and thereafter proceed to complete the preliminary inquiry.

*Cases referred to:-*

(1) *Re Low Kuan Meng* [1962] M.L.J. 265.

(2) *Govindasamy* v. *Public Prosecutor* [1949] M.L.J. 101.

(3) *R.* v. *Tay Choon Huat* [1947] M.L.J. xxiii.

CRIMINAL REVISION.

*S.P. Annamalai* for the 1st applicant/accused.

*R. Rajasingam* for the 2nd applicant/accused.

*Subash Chandran* for the 3rd applicant/accused.

*Abdul Kadir bin Musa* (Deputy Public Prosecutor) for the respondent.

**Gunn Chit Tuan J.:** The three abovenamed persons were charged provisionally as follows:—

"That you jointly with two persons still at large, between the 7th day April 1977 and the 13th day of April 1977, at the Prai Estate (off Jalan Dato Hussein Onn) in the District of Butterworth, in the State of Penang, in furtherance of the common intention of you all did commit murder by causing the death of one Tang Hung Giap, who at the time of his death is believed to be the subject of an offence under section 3(1) of the Kidnapping Act No: 41 of 1961, and that you have thereby committed an offence punishable under section 302 of the Penal Code, read together with section 34 of the same Code."

A preliminary inquiry was directed to be held before the learned Senior President of the Sessions Court, George Town, Penang, sitting as a Magistrate, and he proceeded to hold a preliminary inquiry on November 28, 1977, under Chapter XVII of the Criminal Procedure Code (F.M.S. Cap. 6). In the course of the inquiry, the prosecution produced a statement which was alleged to have been made by the third accused to a Police Inspector and which was record-